Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1079

In the Supreme Court of the United States

OCTOBER TERM, 1987

JEROME J. PALUMBO AND
ROBERT T. PORTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by allowing government witnesses to testify that they had been convicted of crimes similar to the ones for which petitioners were on trial.

2. Whether evidence of petitioner Palumbo's financial dealings with a bank was properly admitted at trial.

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OPINION BELOW

The unpublished opinion of the court of appeals (Pet. App. 1-22) is noted at 829 F.2d 39 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on October 29, 1987. The petition for a writ of certiorari was filed on December 29, 1987, and is therefore one day out of time under this Court's Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner Porter was

convicted of conspiring to defraud the Federal Deposit Insurance Corporation (FDIC), in violation of 18 U.S.C. 371; six counts of making false entries in bank books, in violation of 18 U.S.C. 1005; one count of making false statements in connection with securing a bank loan, in violation of 18 U.S.C. 1014; and eight counts of misapplying bank funds, in violation of 18 U.S.C. 656. Petitioner Porter was sentenced to a total of five years' imprisonment and an $80,000 fine. Petitioner Palumbo was convicted on one count of conspiring to defraud the FDIC, in violation of 18 U.S.C. 371; four counts of making false entries in bank books, in violation of 18 U.S.C. 1005; three counts of making false statements in connection with securing a bank loan, in violation of 18 U.S.C. 1014; and four counts of misapplying bank funds, in violation of 18 U.S.C. 656. Petitioner Palumbo was sentenced to a total of 12 years' imprisonment and a fine of $65,000. The court of appeals affirmed (Pet. App. 1-22).

1. Petitioner Porter was a vice-president and the major shareholder of the Sparta Sanders State Bank in Gallatin County, Kentucky. In 1981, the FDIC issued a cease and desist order against the bank because of its unsound financial condition and ordered it to increase its capital by approximately $315,000 before May 9, 1982, or suffer cancellation of its insurance. In order to comply with the FDIC's directives, Porter devised a scheme to lend the bank's money to his relatives and friends (including petitioner Palumbo), who would then return the money to the bank. Porter required little or no collateral for those loans. Porter then represented to the FDIC that the returned money was a new infusion of capital. As a result of the scheme, Palumbo became a major shareholder in the bank and placed an associate as president of the bank. Pet. App. 3-4.

2. During trial, the government presented the testimony of 14 witnesses who had assisted petitioners in making the fraudulent loans or in laundering the money that was returned to the bank as "capital." Many of those witnesses were hostile to the government. The prosecutor secured admissions from seven of the witnesses that each had previously been convicted of a felony. Linda Lykins, petitioner Porter's former secretary, testified that she had previously been convicted for "the felony offense of a conspiracy violation of Federal laws" (Pet. App. 5). Petitioners did not object to her testimony (*ibid.*; C.A. App. 113-114).

Samuel Isaac, a purchaser of stock in the bank, admitted that he had been convicted in 1983 for the offenses of mail fraud, embezzlement, and false statement (C.A. App. 147, 154). Petitioners objected to that testimony on the grounds that the prosecutor had no right to inquire into the details of the witness's convictions and that the prosecutor had failed to provide that information to the defense (*id.* at 147, 148-149, 151). The court overruled the objections (*id.* at 152, 154). Palumbo asked the court to instruct the jury "of the [effect] of this witness' conviction upon his testimony if any for the jury to believe if there is any" and that the witness's conviction "is not in any way to go to the guilt or innocence of the Defendants on trial" (*id.* at 153). The court instructed the jury that it could consider a witness's conviction in determining the weight to be given his testimony, but it did not include the portion of the requested instruction directing the jury not to consider the conviction against petitioners (*id.* at 154-155). Petitioners did not object to the court's limiting instruction as to the omission of the second part of the instruction they had requested (*id.* at 155; Pet. App. 7).

Jack Pickett, another purchaser of bank stock, testified that he had pleaded guilty to a federal charge of con-

spiracy and that he had been sentenced to five years' imprisonment for that offense (C.A. App. 163, 165-166). Petitioners objected "for the same reason that was given yesterday" and because the prosecutor's inquiry was not "material" (*id.* at 163). The court overruled the objection and permitted the testimony (*id.* at 166; Pet. App. 7-8).

Elaine Oney, petitioner Porter's sister, admitted that she had been convicted of conspiracy in 1986 and sentenced to four years' imprisonment. A bench conference was held off the record, but no objection to the prosecutor's inquiry was recorded (Pet. App. 8-9; C.A. App. 203-204).

Judith Porter, petitioner Porter's wife, testified that she had been convicted of conspiracy in 1986 and had been sentenced to four years' imprisonment. A bench conference was held off the record, but once again no objection was recorded (Pet. App. 9; C.A. App. 236).

David Taylor, a former vice-president of the bank, admitted that he had pleaded guilty to the offense of making a false statement to the Sparta Sanders State Bank (C.A. App. 248-249). Petitioners objected to that testimony on the ground that the government was attempting to "discredit" or "bolster" Taylor, rather than to impeach him (*id.* at 247). The trial court overruled the objection and admitted the testimony (*ibid.*; Pet. App. 11).

Charles Labanz, a former bank official, admitted that in 1985 he had pleaded guilty to charges of conspiracy to defraud the FDIC and misapplication of bank funds (C.A. App. 261-262). Petitioners objected on the ground that "that is a separate indictment" that "would have nothing to do with this case" (*id.* at 256). The court overruled the objection but agreed to give petitioners' requested limiting instruction that a witness's conviction could be used only to assess the witness's credibility and not as evidence of petitioner's guilt (*ibid.*; Pet. App. 9-11).

During its final jury charge, the district court instructed the jury that an accomplice's plea of guilty is not evidence of the guilt of any other person (C.A. App. 298). The court also told the jury that it could consider a witness's conviction of a felony or a crime involving dishonesty or false statement to assess the credibility of that witness (*id.* at 297-299). Petitioners did not object to those instructions (*id.* at 301).

3. The indictment alleged in part that the objective of the conspiracy was to procure loans fraudulently from the Sparta Sanders State Bank and to use the proceeds for their personal use and benefit, including the payment of their debts and obligations (C.A. App. 24-25). At trial, the government offered evidence that Palumbo's business, Classic Cars, owed the bank more than $2.4 million at the time the bank failed (*id.* at 310). The prosecutor explained to the court that that evidence was offered for the limited purpose of showing that Palumbo was motivated to purchase bank shares in order to continue borrowing large sums from the bank (*id.* at 267-271). The prosecutor also stated that her witness, an FDIC official, would testify about "what was due" and "what [was] owed" based on his examination of the bank's records and other pertinent files and documents (*id.* at 270; see *id.* at 267-272). Palumbo objected to that evidence on the ground that it was "in the nature of [Rule] 404(b) evidence" (C.A. App. 273). He contended that Classic Cars was not his business and that civil litigation on that issue was currently pending in state court (*id.* at 268-269, 273). The court overruled the objection and admitted the evidence (*id.* at 273-274; Pet. App. 12-13).

Gregory Coyle, an FDIC bank liquidation specialist, testified that after examining the documents showing the bank's outstanding loans, he had concluded that Classic Cars, which was Palumbo's business, owed the bank more

than $2,414,000 when the bank failed in April 1983 and $2,412,000 when the indictment in this case was filed (C.A. App. 274-277). A chart summarizing the conspirators' outstanding loans from the bank (including Classic Cars' loans) was also admitted into evidence (*id.* at 280, 310). After Coyle testified, petitioner Palumbo moved to strike his testimony because it was "in the nature of [Rule] 404(b) evidence" (C.A. App. 278-279). In the alternative, petitioner Palumbo requested a limiting instruction to the jury. The court denied Palumbo's motions on the ground that it preferred not to comment on the evidence (*id.* at 278-280).

4. The court of appeals affirmed (Pet. App. 1-22). It rejected petitioners' contention that the district court erred by permitting the prosecutor to elicit evidence that its witnesses had been convicted of, or had pleaded guilty to, crimes similar to the ones for which petitioners were on trial (*id.* at 13-20). The court held that the issue could be reviewed only for plain error because petitioners did not object at trial on the ground that the witnesses' convictions were being used as substantive proof of petitioners' guilt (*id.* at 14). The court also concluded that the evidence was admissible to impeach the witnesses' credibility, because of their hostility and refusal to be forthcoming in their testimony (*id.* at 16-17). Furthermore, the court held that the district court's limiting instruction did not constitute plain error, because the proof of petitioners' guilt was overwhelming (*id.* at 19-20).

The court also rejected petitioner Palumbo's claim that the district court erred by admitting evidence that Classic Cars had more than $2.4 million in outstanding loans at the time the bank failed (Pet. App. 20-22). The court found that Palumbo had not preserved his claim that the Classic Cars evidence was inadmissible because it constituted improper character evidence (*id.* at 20-21).

Moreover, because the evidence of Palumbo's guilt was "overwhelming," the court concluded that the trial court's failure to give a limiting instruction with regard to the Classic Cars evidence was harmless error (*id.* at 22).

ARGUMENT

1. Petitioners contend (Pet. 8-12) that the district court erred by admitting evidence that the government's witnesses had been convicted of crimes similar to the offenses for which petitioners were then on trial. That fact-bound question warrants no further review.

In the first place, petitioners' contention can be reviewed only for plain error, since they did not object to the admission of that evidence at trial on the grounds that they assert in their petition. At trial, petitioners argued that the evidence was inadmissible because it was too detailed, because it was irrelevant, because it concerned a separate indictment, and because it was not disclosed to petitioners before trial. Petitioners did not object on the ground that the prosecutor was trying to use the evidence as substantive proof of their guilt. Thus, the court of appeals correctly concluded (Pet. App. 13-16) that petitioners' objections at trial were insufficient to preserve the claim. See Fed. R. Evid. 103(a)(1); *United States* v. *Johnson*, 802 F.2d 1459, 1465, 1466-1467 (D.C. Cir. 1986); *United States* v. *Taylor*, 800 F.2d 1012, 1017 (10th Cir. 1986), cert. denied, No. 86-7014 (Oct. 5, 1987). To prevail under the plain error standard, petitioners must show that the admission of the evidence resulted in a miscarriage of justice. *United States* v. *Johnson*, 802 F.2d at 1465; see generally *United States* v. *Young*, 470 U.S. 1, 15-16 (1985); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982). They have not done so in this case.

An accomplice's conviction of an offense arising from the crime for which a defendant is on trial is inadmissible as substantive proof of the defendant's guilt. Nonetheless, it is well settled that the government can elicit evidence of an accomplice's conviction during direct examination for other reasons: for example, (1) to allow the jury to consider the effect of that conviction on the witness's credibility; (2) to forestall the defense argument that the government is concealing the witness's bias or is unfairly singling out the accused; or (3) to establish the witness's first-hand knowledge of the crime by showing his participation in the offense. See, *e.g.*, *United States* v. *Louis*, 814 F.2d 852, 855-856 (2d Cir. 1987); *United States* v. *McGrath*, 811 F.2d 1022, 1024-1025 (7th Cir. 1987); *United States* v. *Davis*, 766 F.2d 1452, 1456-1457 (10th Cir.), cert. denied, 474 U.S. 908 (1985); *United States* v. *Melton*, 739 F.2d 576, 578-579 (11th Cir. 1984); *United States* v. *Roth*, 736 F.2d 1222, 1226-1227 (8th Cir.), cert. denied, 469 U.S. 1058 (1984); *United States* v. *Renton*, 700 F.2d 154, 160 (5th Cir. 1983).

As the court of appeals noted (Pet. App. 17), the government's witnesses, who were petitioners' former accomplices, were hostile to the government and were not forthcoming in their testimony. Accordingly, it was entirely proper for the government to elicit their convictions for impeachment purposes. Furthermore, petitioners were not unduly prejudiced by the evidence, because the prosecutor's questions were brief and did not suggest that the accomplices' convictions constituted evidence of petitioners' guilt. Indeed, in six of the seven instances in which the witnesses' convictions were elicited as evidence, the prosecutor identified the witness's crime in the abstract and did not suggest that it was related to the one for which petitioners were on trial. Moreover, the district court minimized any prejudice to petitioners by instructing

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the jury during its final charge that evidence of an accomplice's guilty plea was not evidence of the guilt or innocence of any other person, and that the jury could consider evidence of a witness's conviction in assessing that witness's credibility. Finally, the court of appeals found that the proof of petitioner's guilt was "overwhelming" (Pet. App. 19). Petitioners therefore were not prejudiced by the admission of this evidence.[1]

Petitioners err in contending (Pet. 10-11) that the decision below conflicts with *United States* v. *Fleetwood*, 528 F.2d 528 (5th Cir. 1976). The difference between the result in *Fleetwood* and the result in this case is due to a difference in the facts, not a disagreement on principle. In *Fleetwood*, the court acknowledged that a prosecutor may elicit evidence of an accomplice's prior conviction in order

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[1] Petitioners also criticize (Pet. 11-12) the limiting instruction given by the district court during trial that a witness's conviction could be considered in assessing his credibility. Petitioners argue that the instruction was insufficient because it did not also state that the jury should not consider a witness's conviction as evidence of petitioners' guilt. That claim lacks merit, for two reasons.

First, petitioners have not preserved that issue for review because, although they requested such an instruction, they did not object to the sufficiency of the limiting instruction that the trial court gave after it was given. 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065, at 325 (1977); see *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9-10 & n.8 (a defendant bears the "primary responsibility" for ensuring that a curative instruction is sufficiently specific). Second, the instruction given by the district court during trial must be viewed together with the instruction that the court gave during its final jury charge. When read together, the court's instructions were sufficient. See *United States* v. *McGrath*, 811 F.2d at 1024-1025 (instruction to consider accomplice's conviction solely on issue of accomplice's credibility was sufficient despite the omission from the charge that the accomplice's conviction should not be considered as proof of the defendant's guilt).

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to impeach his credibility (*id.* at 532, 533), but it held that, under the particular facts of that case, the prosecutor's "repeated, methodical, and essentially unnecessary questioning" (*id.* at 535) of several government witnesses concerning their guilty pleas to offenses similar to the crime for which the defendant was on trial resulted in the use of the convictions as substantive evidence of the defendant's guilt. Since *Fleetwood*, the Fifth Circuit has recognized that the decision in that case requires a reviewing court to consider seven different factors in evaluating a claim of error, such as whether the defendant objected at trial, whether the prosecutor sought to use an accomplice's convictions as substantive proof of the defendant's guilt, whether the trial judge gave a limiting instruction, and whether the proof of the defendant's guilt was strong or weak. *United States* v. *Renton*, 700 F.2d at 160; *United States* v. *Borchardt*, 698 F.2d 697, 701 (5th Cir. 1983), cert. denied, 469 U.S. 937 (1984); *United States* v. *Black*, 685 F.2d 132, 135 (5th Cir.), cert. denied, 459 U.S. 1021 (1982). In this case, the prosecutor's questioning of the witnesses was brief and unremarkable. She did not aggressively and repeatedly question the witnesses about their convictions, and she did not imply that the evidence could be considered as proof of petitioners' guilt. The trial judge instructed the jury that evidence of the witnesses' convictions should be considered only with regard to their credibility. And the proof of petitioners' guilt was overwhelming. Accordingly, the decision in this case is not inconsistent with the Fifth Circuit's decision in *Fleetwood*.

2. Petitioner Palumbo contends (Pet. 13-19) that the evidence of Classic Cars' outstanding loans from the Sparta Sanders State Bank was improperly admitted under Fed. R. Evid. 404(b) as similar act evidence. That contention lacks merit.

Rule 404(b) states that evidence of similar acts committed by the defendant is not admissible to prove that he is a person of bad character, but may be admissible to show, among other things, his motive, plan, or intent. In this case, the evidence that Classic Cars owed the bank more than $2.4 million was not "similar act" evidence at all, because it did not involve any collateral act of misconduct on Palumbo's part. The indictment alleged that Palumbo and his co-conspirators obtained a financial interest in the bank in order to use the bank's assets for their personal benefit. Proof that Classic Cars owed the bank more than $2.4 million at the time the bank failed did not constitute evidence that petitioner Palumbo had committed a different crime. Rather, that evidence simply showed that Palumbo's motive in acquiring a financial interest in the bank was to further his own business. Because that proof did not involve any "similar act," it was not subject to Rule 404(b). See *United States* v. *Wood*, 834 F.2d 1382, 1386-1387 (8th Cir. 1987) (evidence of defendant's large cash purchases showed that he was a participant in conspiracy; evidence not subject to Rule 404(b)); *United States* v. *Bernal*, 719 F.2d 1475, 1478-1479 (9th Cir. 1983) (evidence of large amount of cash and narcotics distribution paraphernalia showed that defendant participated in drug conspiracy; not Rule 404(b) evidence). Furthermore, the FDIC official's testimony was based upon his examination of the pertinent bank records. Accordingly, contrary to petitioners' claim (Pet. 13), there was a substantial basis for admitting the evidence. Finally, even if that evidence was improperly admitted, the error was harmless because, as both the district court (C.A. App. 308) and the court of appeals (Pet. App. 22) noted,

the proof of Palumbo's guilt was "overwhelming." See *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988

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[2] There is no reason to hold this case pending the Court's decision in *Huddleston* v. *United States*, cert. granted, No. 87-6 (Oct. 13, 1987). The question in *Huddleston* is whether the government must prove by clear and convincing evidence that the defendant has committed a similar act before evidence of that act may be admitted under Fed. R. Evid. 404(b). In this case, the Classic Cars loan evidence related directly to the conspiracy charge in the indictment and was not similar act evidence subject to Rule 404(b). The government therefore would not have had to prove its existence by clear and convincing evidence, even under the test for which the petitioner in *Huddleston* is contending. In addition, the court of appeals found that any error in the admission of this evidence was harmless. Thus, regardless of how this Court resolves *Huddleston*, the decision in that case will not affect the disposition of this case.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60316